No. 1945.

IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

The Atchison, Topeka and Santa Fe Railway Company, a corporation,
Plaintiff in Error,
vs.
Alice M. Gilliland,
Defendant in Error.

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR.

W. O. Morton and
Harry A. Hollzer,
Attorneys for Defendant in Error.
Newman Jones,
Of Counsel.

Parker & Stone Co., Law Printers, 238 New High St., Los Angeles, Cal.

No. 1945.

IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

The Atchison, Topeka and Santa Fe Railway Company, a corporation,
Plaintiff in Error,
vs.
Alice M. Gilliland,
Defendant in Error.

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR.

By leave of court first had and obtained the defendant in error respectfully files this her supplemental brief touching certain of the questions arising or suggested during the oral argument had upon the hearing in open court on May 1, 1911:

I.

We had occasion during the oral argument to refer, by way of argument, to what we then understood and now understand to be the well settled rule, that an action

will not be dismissed by a Circuit Court of Appeals on the ground that the pleadings do not show the requisite diversity of citizenship to give the Circuit Court jurisdiction, where the requisite jurisdictional facts appear in the evidence embodied in a bill of exceptions contained in the transcript.

And the point we were in this connection endeavoring to make and illustrate was this: That the defeated litigant does not, in such a case, *confer jurisdiction* by perfecting the bill of exceptions. The jurisdiction in such a case already exists, and has appeared and attached in and by the evidence, and the defeated party, even as he could not by the mere making of a bill of exceptions confer it, neither could he by failing or neglecting to perfect a bill of exceptions withdraw or withhold the jurisdiction already attached.

The point, in short, which we were endeavoring to make was, that the bill of exceptions in such cases is only *a means, and not the only means,* by which it may appear by the record to the satisfaction of this court, that the requisite diversity of citizenship not only does in point of fact exist, but that it also sufficiently and satisfactorily appeared in and by the evidence at the trial, whereby the trial court became and was vested and endowed with jurisdiction,—which, as it was in no wise dependent upon, neither could it be in any manner divested by, anything that the defeated party might see fit to do or neglect to do. The judgment in such a case is not void merely if or because the defeated party neglects or omits to perfect a bill of exceptions. As against any collateral attack, it will take care of itself, (Cutler v. Huston, 155

U. S. 423), and upon direct attack, as we contend upon the authority of Railway Company v. Ramsey, 22 Wall. 322, all that is or should be necessary is that the jurisdiction of the trial court may appear "either directly or by just inference from any part of the record."

Howe v. Howe etc. Co., 154 Fed. 822, 823.

It appears, in the case at bar, from the transcript and the judgment contained therein [Tr. p. 21], that for three days the learned Circuit Court and the jury empaneled therein and the parties to this action were occupied in the trial of this case upon its merits, and that after verdict and judgment against the railway company it prosecutes this writ of error without any bill of exceptions. It is our contention that in such a case the reasonable, and just and proper inference, and the only reasonable and just and proper inference is that the necessary diversity of citizenship and jurisdiction of the Circuit Court did fully and fairly and sufficiently and satisfactorily appear and attach in and by the evidence given at the trial.

Cases in which there was a bill of exceptions are manifestly not in point, in the case at bar where there is none; and the cases in which the defeated party after a trial upon the merits has prosecuted his writ of error without a bill or exceptions are apparently few; and the learned counsel for the plaintiff in error has cited no such case, and we have found none, in which this contention which we now make has been made and passed upon,—and hence we say that any and all the cases that may be cited, as making against us, wherein our contention now made, was not made or passed upon, are not in point or

authority in this case, where it is made. We are impelled to invoke this general rule of construction of cases, for the reason that we will have no opportunity to distinguish or review the cases that may be cited by the plaintiff in error in reply to this supplemental brief.

In support of the rule referred to and relied upon by us as a basis of argument, that is to say, that an action will not be dismissed by a Circuit Court of Appeals upon the ground that the pleadings do not show the requisite diversity of citizenship to give the Circuit Court jurisdiction, where the requisite jurisdictional facts appear in the evidence embodied in a bill of exceptions contained in the transcript, we respectfully refer to the following cases.

Jumeau v. Brooks (C. C. A. 5th Circuit, June 1, 1901), 109 Fed. 353, and
Briges v. Sperry, 95 U. S. 401, 403,

wherein the Supreme Court, by Mr. Justice Miller, citing Railway Co. v. Ramsey, *supra,* say that:

> "One of the errors alleged as grounds for reversing the decree in favor of Sperry is, that this amended bill shows no jurisdiction in the Circuit Court. If nothing else be looked at but the bill, there is no jurisdiction shown. But the proceedings in the state court, which are properly here as part of the record of the case, show that it was removed from the state court to the federal court, on account of the citizenship of the parties; and this of itself must have given jurisdiction to the United States court before the amended bill was filed. That jurisdiction is not lost, because the facts on which it arose are not set out in the old or the new complaint. Railway Company v. Ramsey, 22 Wall. 322."

The other cases citing and supporting Railway Co. v. Ramsey and read by us upon the oral argument, and which are not cited in our original brief, are as follows:

Howe v. Howe etc. Co., 154 Fed. 820, 822, and

Davies v. Lathrop, 13 Fed. 565.

In the case last cited the plaintiffs having brought the action in the state court, the defendant removed it into the Circuit Court upon a petition alleging the plaintiffs to be citizens of the state of New York, and the defendant to be a citizen of the state of New Jersey, and the case was tried in the Circuit Court and resulted in a verdict for the defendant; and thereupon the plaintiff moved to remand the action to the state court upon the ground that, in fact, one of the plantiffs was a citizen of the same state with the defendant; and it was thi condition which so justly merited and evoked the withering rebuke of the court contained in the language of the learned Chief Justice that,

> "The plaintiffs, knowing the truth, chose, instead of moving to remand, and thereby correcting the mistake, to permit the defendant to incur the burden of a trial. Apparently they concluded to take the chances of trial, with the view of remaining silent if it should result favorably, but of springing the objection if it should result adversely. Such practice will not be willingly tolerated, because it is unjust to the party who has been subjected to the expense of a futile trial, and because it imposes upon the court the labor of a nugatory proceeding."

We refer to this case simply and only for the purpose of illustrating how unreasonable and impossible it is, or should be, for this court, in the absence of a bill of exceptions affirmatively showing it, to entertain for a mo-

ment the inference, or the supposition, that the distinguished counsel for the plaintiff in error in this case have resorted to any such practice, and how just and reasonable it is to draw and act upon the irresistible inference and conclusion that they did not do so, and that the necessary diversity of citizenship did fully appear in and by the evidence at the trial, and that the case was in good faith tried by the court and by the plaintiff in error and all concerned upon that theory and with that understanding.

II.

The learned counsel for the plaintiff in error replying upon oral argument to the second branch or division of the argument contained in our original brief, dealing with the instructions proper to be given by this court in case of a reversal of the judgment of the lower court, admitted that the cases of Fitchburg Railway Co. v. Nichols, 85 Fed. 869, and Grand Trunk Western Railway Company v. Reddick, 160 Fed. 898, cited and relied upon by us, are in point, and he has not undertaken to deny that the conclusions therein arrived at and announced are just, or that they should prevail in the case at bar, unless it shall be found that they are in conflict, as he claims they are, with certain of the decisions of the Supreme Court of the United States, to which he has referred. We did not succeed in noting all of the cases so cited by counsel, but according to our recollection he cited first, and seemed principally to rely, upon an isolated paragraph from the opinion in Mexican Central Railway Co. v. Duthie, 189 U. S. 76, 77, wherein it was said that

> "If the complaint or petition had remained as it was originally framed, and the case had then been carried to the Circuit Court of Appeal, that court would have been constrained to reverse the judgment and remand the cause for a new trial, with leave to amend."

It is manifest, however, that this is no more than the *dictum* of the court, uttered by way of argument merely, and as such not to be considered as an authority either in the court in which it was uttered or in any other, since the complaint or petition referred to had not remained as it was originally framed, and the case had not been carried to the Circuit Court of Appeal, and since furthermore the question and the request we are now considering was neither raised or passed upon in that case in any court.

We remember also that Robertson v. Cease, 97 U. S. 646, was another case cited and relied upon by counsel in this connection. It is to be observed, however, that there was not in that case any application to the court for an instruction to the lower court similar to that given in the case of Grand Trunk Railway Company v. Reddick, *supra,* and that the propriety of the practice and procedure followed and adopted by the courts in that case and in the case of Fitchburg Railway Company v. Nichols, *supra,* was not by the court in any way referred to or considered; manifestly, therefore, the decision of the Supreme Court in that case should not be regarded as determinative in this.

As regards the others of the cases cited by counsel in this connection, we failed to succeed in noting the citations, but so far as we were able to gather from the

extracts therefrom read by counsel, they were either as in the case of Robertson v. Cease, not in point, or as in Mexican Central Railway Company v. Duthie, but *dictum.*

III.

As to the suggestion or application of the plaintiff in error, in effect that it be permitted to withdraw its plea in bar and plead to the venue, notwithstanding its waiver of that privilege by pleading and going to trial upon the merits, in the Circuit Court.

This suggestion or application (if it can be so considered) appears for the first time in counsel's closing oral argument, and at a time, therefore, when in due course, we had no opportunity to reply thereto, and for that reason we trust it may be thought not improper for us to state our objections thereto in this manner and form.

The first, and perhaps the strongest and best, objection that can be made to this application is, that it is not, and was not at the oral argument even claimed to be, in furtherance of justice. The learned counsel for the plaintiff in error has announced in his oral argument with distinctness that the plaintiff in error in this case intends to stand and rely upon its "strict legal rights." It would be within its strict legal right, if the opportunity occurs, for the plaintiff in error to plead the statute of limitations as against the plaintiff's cause of action in this case. But it is too much, as we respectfully submit, to ask or expect of this court that it will, under the circumstances, willingly co-operate with the plaintiff in error to bring about that opportunity.

The general rule is, undoubtedly, as stated in the Encyclopedia of Pleading and Practice, Vol. 1, p. 34, that:

> "After a plea to the merits the defendant cannot withdraw it and plead in abatement, except by leave of court, which will only be granted in general under very special circumstances."

We know of no authority denying the power of this court to instruct the Circuit Court, in a proper case, as requested by the plaintiff in error in this respect. But we respectfully venture to believe that the court will not, under the circumstances of this case, do so.

Respectfully submitted.

W. O. Morton and
Harry A. Hollzer,
Attorneys for Defendant in Error.

Newman Jones,
Of Counsel.